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DEPARTMENT OF HEALTH AND HUMAN SERVICES

Centers for Medicare & Medicaid Services

42 CFR Part 447

[CMS-2328-F2]

RIN 0938-AS89

Medicaid Program; Deadline for Access Monitoring Review Plan Submissions

AGENCY: Centers for Medicare & Medicaid Services (CMS), HHS.

ACTION: Final rule.

SUMMARY: In the November 2, 2015 **Federal Register**, we published a final rule with comment period entitled “Medicaid Program: Methods for Assuring Access to Covered Medicaid Services.” The final rule with comment period established that states must develop and submit to CMS an access monitoring review plan by July 1, 2016. This document revises the deadline for states’ access monitoring review plan submission to CMS until October 1, 2016.

DATES: Effective Date: These regulations are effective on April 8, 2016.

FOR FURTHER INFORMATION CONTACT: Jeremy Silanskis, (410) 786-1592.

SUPPLEMENTARY INFORMATION:

I. Background

In the November 2, 2015 **Federal Register** (80 FR 67576), we published the “Medicaid Program: Methods for Assuring Access to Covered Medicaid Services” final rule with comment period that outlined a transparent data-driven process for states to document whether Medicaid payments are sufficient to enlist providers to assure beneficiary access to covered care and services consistent with section 1902(a)(30)(A) of

the Social Security Act (the Act). This final rule with comment period included new §447.203(b)(1) through (8) and revisions to §447.203(b). These regulations established that states must develop and submit to CMS an access monitoring review plan by July 1, 2016 for the following service categories: primary care services (including those provided by a physician, FQHC, clinic or dental care); physician specialist services (for example, cardiology, urology, radiology); behavioral health services (including mental health and substance use disorder); pre- and post-natal obstetric services, including labor and delivery; and home health services.

II. Discussion and Provisions of this Final Regulation

In the November 2, 2015 final rule with comment period, we solicited comments on §447.203(b)(5). Specifically, we solicited comments on the scope of services required for ongoing review in the review plans, the elements of review required through the plans, whether we should allow exemptions to the rule based on state program characteristics (for example, high managed care enrollment), and the deadline for submission of the initial access monitoring review plan. We received many comments that were outside of the scope of issues on which we solicited comments. Several commenters raised concerns over CMS's characterization in the regulatory preamble of the Supreme Court Decision: Armstrong v. Exceptional Child Center, Inc., 135 S. Ct. 1378 (2015). Though we did not solicit comments on this issue, we agree with commenters that the decision is subject to judicial interpretation and we did not intend to imply an interpretation by the agency.

The following is a summary of the comments and our responses on

§447.203(b)(5).

Comment: We received many comments requesting that CMS not allow exemptions based on high managed care enrollment or other program features.

Response: While we continue to consider whether exemptions might be warranted in some circumstances, we believe that further experience with the access monitoring review system set forth in the final rule with comment period is necessary to determine the appropriate circumstances. The commenters did not offer consistent suggestions or supporting evidence to set a threshold that could exempt states, nor any suggestions for alternatives states might use to demonstrate compliance with section 1902(a)(30)(A) of the Act outside of the final rule with comment period requirements.

Comment: A number of commenters recommended that CMS expand the services that CMS requires states to review in access monitoring plans.

Response: Commenters that requested additional services did not provide sufficient data to compel us to modify the list of core services subject to the ongoing access reviews. The core services included in the final rule with comment period (that is, primary care services, physician specialist services, behavioral health services, pre- and post-natal obstetric services and home health services) were selected because they are frequently used services in Medicaid and access to these services indicates that an individual has primary sources of care, which may increase the likelihood of having their care needs met. We also note the final rule with comment period provides providers an opportunity and mechanism to bring access concerns to the attention of state Medicaid agencies and provide feedback on rate changes that may have a negative effect on access

before states submit proposals to CMS.

Comment: Several commenters requested CMS change the due date by which states are required to develop and submit the initial Access Monitoring Review Plans. Commenters noted that state agency staff may have difficulty developing and submitting the initial review plans within the July 1, 2016 timeframe for first year reviews. These commenters offered several different dates as an alternative, including: January 1, 2017, July 1, 2017, and 6 months following the close of the state's next legislative session. A number of other commenters requested CMS maintain the timelines established in the final rule.

Response: We established the July 1, 2016 deadline for developing and submitting the access monitoring review plans in the final rule with comment period after careful consideration of issues raised through comments on the notice of proposed rulemaking (76 FR 26342) and after weighing all of the policies discussed in the final rule. Since issuing the final rule with comment period, we have been working closely with states on developing the access monitoring review plans. States are actively engaged in developing plans and have raised significant concerns over fulfilling the requirements of the rule by the July 1, 2016 deadline. Several states have noted that additional time will allow them to develop more robust and proficient review plans, and leave them better prepared to analyze and monitor compliance with section 1902(a)(30)(A) of the Act. We agree with this assessment and believe that there are programmatic benefits to revising the due date and making conforming changes to the deadline for submission in subsequent review periods.

Revision to the Access Monitoring Review Plan Timeframe: Based on concerns raised by commenters, in this final rule we are revising the deadline for submission effective date of the initial access monitoring review plan timeframe provision at §447.203(b)(5) introductory text until October 1, 2016. A conforming change will also be made to the deadline for submission in subsequent review periods at §447.203(b)(5)(i) to October 1.

III. Waiver of Proposed Rulemaking and Delayed Effective Date

Under section 553(b) of the Administrative Procedure Act (APA), the agency is required to publish a notice of the proposed rule in the **Federal Register** before the provisions of a rule take effect. Similarly, section 1871(b)(1) of the Act requires the Secretary to provide for notice of the proposed rule in the **Federal Register** and provide a period of not less than 60 days for public comment. In addition, section 553(d) of the APA, and section 1871(e)(1)(B)(i) of the Act mandate a 30-day delay in effective date after issuance or publication of a rule. Sections 553(b)(B) and 553(d)(3) of the APA provide for exceptions from the APA notice and comment, and delay in effective date requirements; similarly, sections 1871(b)(2)(C) and 1871(e)(1)(B)(ii) of the Act provide exceptions from the notice and comment, and delay in effective date requirements of the Act. Section 553(b)(B) of the APA and section 1871(b)(2)(C) of the Act authorize an agency to dispense with normal notice and comment rulemaking procedures for good cause if the agency makes a finding that the notice and comment process is impracticable, unnecessary, or contrary to the public interest; and includes a statement of the finding and the reasons for it in the notice. In addition, both section 553(d)(3) of the APA and section

1871(e)(1)(B)(ii) of the Act allow the agency to avoid the 30-day delay in effective date where such delay is contrary to the public interest and the agency includes in the rule a statement of the finding and the reasons for it.

Because the deadlines for submission of access monitoring review plans are rules of procedure, the notice and comment requirements of 5 U.S.C. section 553 do not apply to this delay of the submission date. See 5 U.S.C. 553(b)(3)(A). To the extent that section 553 applies in these circumstances however, CMS finds that the action comes within the provision's good cause exceptions because obtaining additional public comment is impracticable, unnecessary, and contrary to the public interest. See 5 U.S.C. 553(b)(3)(B). Given the imminence of the submission date, and the need for states to plan and allocate resources in advance, seeking public comment and having a delayed effective date for this short delay in the deadline for submission of access monitoring review plans is impracticable. And, because we provided an opportunity for public comment on issues that included the submission deadlines, further opportunity is not necessary. Moreover, we believe that delay of the submission deadlines would further the public interest in orderly implementation of regulatory requirements, and in ensuring development of viable access monitoring review plans in light of assertions by commenters that compliance with the original submission deadlines might be infeasible or disruptive.

IV. Collection of Information Requirements

The November 2, 2015 final rule with comment period stipulated that states must develop and submit (to CMS) their initial access monitoring review plan by July 1, 2016.

We are now extending the submission deadline to October 1, 2016. Similarly, we are revising the deadline for subsequent review periods from July 1 to October 1. Otherwise, this final rule does not impose any new or revised information collection requirements or burden. The November 2, 2015, information collection requirements and burden are approved by OMB under control number 0938-1134 (CMS-10391).

V. Regulatory Impact Statement

In the November 2, 2015 final rule with comment period, we discussed the impact of the access monitoring review plan requirements on states. We do not believe this delay of the deadline for submission of the access monitoring review plans will change any of the discussion in the impact statement of the November 2, 2015 final rule with comment period.

In accordance with the provisions of Executive Order 12866, this regulation was reviewed by the Office of Management and Budget.

List of Subjects in 42 CFR Part 447

Accounting, Administrative practice and procedure, Drugs, Grant programs-health, Health facilities, Health professions, Medicaid, Reporting and recordkeeping requirements, Rural areas.

For the reasons set forth in the preamble, the Centers for Medicare & Medicaid Services amends 42 CFR chapter IV as set forth below:

PART 447—PAYMENTS FOR SERVICES

1. The authority citation for part 447 continues to read as follows:

Authority: Sec. 1102 of the Social Security Act (42 U.S.C. 1302).

§447.203 [Amended]

2. Section 447.203 is amended by:

- a. In paragraph (b)(5) introductory text, removing the date “July 1, 2016” and adding in its place the date “October 1, 2016”.

- b. In paragraph (b)(5)(i), removing all instances of the date “July 1” and adding in their place the date “October 1”.

Dated: March 11, 2016.

Andrew M. Slavitt,

Acting Administrator,

Centers for Medicare & Medicaid Services.

Dated: April 6, 2016.

Sylvia M. Burwell,

Secretary,

Department of Health and Human Services.

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